

Decision \_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company (U39E) for Approval of an Amendment of its Power Purchase Agreement with Fresno Cogeneration Partners, LP and for Authority to Recover the Costs of the Amended Agreement in Rates.

Application 12-12-026  
(Filed December 28, 2012)

**DECISION GRANTING THE APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS POWER PURCHASE AGREEMENT WITH FRESNO COGENERATION PARTNERS, LP****1. Summary**

This decision grants the Application of Pacific Gas and Electric Company (PG&E) for approval of an amendment of its Power Purchase Agreement with Fresno Cogeneration Partners, LP (Fresno Cogen). The Amended Power Purchase Agreement provides that PG&E will compensate Fresno Cogen towards its greenhouse gas compliance costs in exchange for lower capacity payments.

**2. Factual Background**

In this application, Pacific Gas and Electric Company (PG&E) seeks approval of an amendment (Amendment) to a Power Purchase Agreement (PPA) with Fresno Cogeneration Partners, LP (Fresno Cogen), originally approved on December 14, 2006 by Resolution E-4027. Under the existing PPA, Fresno Cogen provides energy and capacity to PG&E and is paid a variable energy price and a fixed capacity payment. The PPA expires on February 9, 2020.

PG&E and Fresno Cogen negotiated the original PPA prior to the passage of Assembly Bill (AB) 32, the statute that set greenhouse gas (GHG) emission reduction targets. The original PPA did not explicitly address responsibility for GHG compliance costs. The Amendment to the PPA provides that PG&E will compensate Fresno Cogen towards its GHG compliance costs in exchange for a reduction in capacity payments. PG&E asserts that the PPA as amended (Amended PPA) reflects a compromise between PG&E and Fresno Cogen over the allocation of GHG compliance costs. PG&E further states that the Amendment preserves the value of the earlier PPA by providing a capacity price reduction to PG&E in exchange for PG&E's payment of Fresno Cogen's GHG compliance costs as specified by the Amendment. PG&E argues that the Amendment merits approval because it provides substantial benefits for PG&E's customers compared to the risk of potential outcomes of regulatory or adversarial proceedings in the absence of a negotiated compromise. Amended PPA approval is sought by application because the Amendment term exceeds five years.

PG&E requests that the Commission approve the Amended PPA and authorize rate recovery by PG&E of costs incurred under the Amended PPA, subject only to Commission review of the prudence of PG&E's administration of the Amended PPA. PG&E further requests authorization to recover any stranded costs that arise from the Amended PPA, pursuant to the provisions of Decision (D.) 04-12-048 and D.08-09-012. Additionally, PG&E requests confidential treatment for certain materials filed in this proceeding.

## **2.1. Procedural Background**

On December 28, 2012, PG&E filed Application (A.) 12-12-026. The application was noticed on the Commission's Daily Calendar on January 2, 2013. No protests or other responses were filed.

On February 7, 2013, the assigned Administrative Law Judge (ALJ) issued a ruling setting a prehearing conference (PHC) and directing PG&E to augment the record with responses to certain questions.

PG&E filed and served its "Response to the Administrative Law Judge's Request for Additional Information" on February 21, 2013.

On February 25, 2013, a telephonic PHC was held and the assigned ALJ directed PG&E to file a "Response to Administrative Law Judge's 2<sup>nd</sup> Request for Additional Information" in order to supplement and clarify the previous response.

PG&E filed and served its "Response to Administrative Law Judge's Supplemental Request for Additional Information" on February 27, 2013.

## **2.2. Regulatory Background**

In June 2005 Governor Schwarzeneger issued Executive Order S-3-05, establishing GHG emission reduction targets.

AB 32, the statute setting GHG emission reduction targets, was chaptered on September 27, 2006.

In 2011, the California Air Resources Board (CARB) adopted the "California Cap on GHG emissions and Market-Based Compliance Mechanism," commonly known as California's "Cap and Trade" regulation. In its Final Statement of Reasons regarding Cap and Trade, CARB indicated that insofar as existing contracts might not include provisions allowing full pass-through of

carbon costs associated with Cap and Trade, its staff believed that bilateral contract negotiations would provide the best resolution of the issue.

In D.12-04-046 in the recent Rulemaking to Integrate and Refine Procurement Policies and Consider Long-Term Procurement Plans Rulemaking (R.) 10-05-006, the Commission considered the request of the Independent Energy Producers Association to determine the treatment of GHG compliance costs associated with contracts executed between independent generators and utilities prior to the passage of AB 32 that do not include a mechanism for recovery of such costs.

In response, the Commission stated:

The parties should be able to renegotiate any contracts that currently do not address the allocation of AB 32 compliance costs, so that the contracts are modified to be consistent with Commission policy. Rather than rewrite the existing contracts based on the limited record before us, we direct the utilities to renegotiate the contracts at issue so that they reasonably address the allocation of AB 32 compliance costs. . . . If the contracts have not been renegotiated and submitted to the Commission for approval 60 days from the effective date of this decision, the Commission will address and resolve this issue in R.11-03-012.<sup>1</sup>

In the Rulemaking to Address Utility Cost and Revenue Issues Associated with greenhouse gas Emissions, R.11-03-012, an Assigned Commissioner's and Administrative Law Judge's Ruling Amending the Scoping Memo (Amended Scoping Memo) was issued on August 2, 2012. The Amended Scoping Memo stated that R.11-03-012 would review the issues of GHG

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<sup>1</sup> D.12-04-046 at 62.

compliance cost recovery for power purchase agreements executed before the passage of AB 32 that have no such mechanism. However, the Amended Scoping Memo encouraged parties “to reach agreement on contract terms rather than ask for terms to be imposed by this Commission.”<sup>2</sup> Fresno Cogen and PG&E therefore entered into negotiations and have agreed that PG&E will compensate Fresno Cogen toward its GHG compliance costs in exchange for a contract capacity price reduction for the benefit of PG&E’s customers.

### **3. Discussion**

#### **3.1. Consistency with Regulatory Guidance**

The amended PPA is consistent with regulatory guidance from both this Commission and CARB recommending bilateral negotiations to address GHG costs. PG&E and Fresno Cogen have bilaterally negotiated a mutually satisfactory resolution of GHG cost responsibility. In both D.12-04-046 and the Amended Scoping Memo in R.11-03-012, this Commission has encouraged parties to renegotiate pre-AB 32 contracts in order to take GHG costs into account.

#### **3.2. PG&E’s Customers Benefit from the Amended PPA**

PG&E’s customers benefit from the Amended PPA because it preserves the value of the original PPA for PG&E ratepayers because GHG costs paid by PG&E are offset through a reduction in the capacity price paid to Fresno Cogen. In addition to the reduction in capacity price, PG&E ratepayers avoid the risk of costly regulatory or legal proceedings and a less favorable resolution of the dispute. In exchange for this price reduction, PG&E will compensate Fresno Cogen toward its GHG compliance costs, thus taking on both cost and risk. In

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<sup>2</sup> R.11-03-012, amended Scoping Memo at 7.

Appendix A and its responses to the ALJ requests for information, PG&E describes its forecast of ratepayer costs and provides ranges for those costs under alternative assumptions.

We find that the certainty and capacity price reduction afforded by the Amended PPA justify the GHG compliance costs and risks assumed by PG&E ratepayers.

We note, however, that the sensitivity analysis provided by PG&E<sup>3</sup> does show different dispatch patterns (i.e. different forecast capacity factors) in the alternative scenarios. PG&E must prudently administer this Amended PPA, including making prudent decisions of whether or not to dispatch Fresno Cogen or pursue alternative energy procurement options.

### **3.3. Stranded Cost Recovery**

In D.04-12-048 and D.08-09-012, we established a framework for recovering stranded costs from departing customers. Although PG&E has not advised us of any expected stranded costs, we conclude that the Amended PPA is eligible for stranded cost recovery under this framework if such costs arise.

### **3.4. Safety Considerations**

In its Response to the Administrative Law Judge's Request for Additional Information, PG&E identifies two provisions of the original PPA (which are both retained in the Amended PPA) regarding safe operation of the facility:

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<sup>3</sup> See Response to ALJ's Supplemental Request for Additional Information at 2.

Section A-4.1 requires Fresno Cogen to operate consistent with prudent electrical practices, which is a defined term in the Amended PPA. Prudent electrical practices encompass a number of elements including safety. Section A-11 requires Fresno Cogen to operate its facility in a way to protect it from electrical disturbances or faults, which could create a safety risk at the facility.<sup>4</sup>

PG&E also notes that General Order 167, which governs the safe and reliable operation of power plants in California, applies to Fresno Cogen.

#### **4. Request for Confidential Treatment**

In this proceeding, PG&E provides the following confidential documents:

- Appendix A – Confidential Summary and Analysis;
- Appendix B – Confidential Amendment;
- Response to Administrative Law Judge’s Request for Additional Information; and
- Response to Administrative Law Judge’s Supplemental Request for Additional Information.

Taken as a group, these documents describe in detail the Amended PPA and information about the value of the transaction to PG&E. PG&E also filed redacted, public versions of Appendix A and its Responses to the ALJ’s Requests for Additional Information.

At the time of filing the confidential documents, PG&E also filed motions to file the confidential materials under seal, citing General Order 66-C, D.06-06-066, D.08-04-023, and Public Utilities Code § 583. These motions are unopposed. We agree that the information contained in this material is market

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<sup>4</sup> Response to the Administrative Law Judge’s Request for Additional Information at 7.

sensitive and that PG&E's motions are consistent with the authorities cited. Therefore we grant PG&E's motions for confidential treatment.

The confidential, unredacted versions of these documents shall remain under seal for three years from the effective date of this decision, and shall not be made accessible or disclosed to anyone other than the Commission and its staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned ALJ or the ALJ then designated as Law and Motion Judge.

### **5. Waiver of Comment Period**

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Pub. Util. Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

### **6. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Kevin Dudney is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The Amended PPA is consistent with Commission guidance that contracting parties should bilaterally negotiate resolutions to GHG cost responsibility disputes.

2. In exchange for PG&E's payments towards Fresno Cogen's GHG compliance costs, the Amended PPA retains the value of the original PPA for PG&E customers by a reduction in the capacity price and avoiding costly and uncertain regulatory or legal proceedings to allocate GHG cost responsibility.



**Conclusions of Law**

1. Because PG&E's payments for GHG compliance costs are offset by a reduction in the capacity price paid to Fresno Cogen, the terms of the Amended PPA are reasonable.
2. Because the Amended PPA is consistent with the law and Commission guidance, and because its terms are reasonable, the Amended PPA should be approved.
3. Since the GHG compliance costs are reasonable, PG&E should recover the costs of the Amended PPA through its Energy Resource Recovery Account.
4. Any stranded costs that may arise from the Amended PPA should be eligible for stranded cost recovery under the provisions of D.04-12-048 and D.08-09-012.
5. PG&E should be allowed to recover the costs of the Amended PPA in rates, subject to Commission review of the prudence of PG&E's administration of the Amended PPA.
6. PG&E's motions to file materials under seal are consistent with the provisions of General Order 66-C, D.06-06-066, D.08-04-023, and Public Utilities Code § 583; these motions should be granted.
7. The preliminary categorization of this proceeding as ratesetting should be confirmed. Hearings are not necessary.

**O R D E R****IT IS ORDERED** that:

1. The Amendment of Pacific Gas and Electric Company's (PG&E) Power Purchase Agreement (Amended PPA) with Fresno Cogeneration Partners, LP (Fresno Cogen) is approved in its entirety, including payments made by PG&E

under the Amended PPA, subject to the Commission's review of the prudence of PG&E's administration of the Amended PPA.

2. The confidential, unredacted versions of the documents filed under seal shall remain under seal for three years from the effective date of this decision, and shall not be made accessible or disclosed to anyone other than the Commission and its staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ) or the ALJ then designated as Law and Motion Judge.

3. Application 12-12-026 is categorized as ratesetting.

4. Hearings in this proceeding are not necessary.

5. Application 12-12-026 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.